Leow Seng Huat v Low Mui Yein

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24–221–95
MOHD HISHAMUDIN J
10 SEPTEMBER 1995

Civil Procedure *— Consent order — Validity of — Allegation that counsel not authorized to agree to consent order — Whether opposing party could rely on consent order*

Civil Procedure *— Contempt of court — Breach of consent order — Application for committal to prison — Whether omission of penal notice in consent order fatal to committal application — Effect of failure to make personal service of order — Rules of the High Court 1980 O 45 r 7(2), (4) & Form 87*

The plaintiff and defendant were husband and wife and they had a two-year-old child. The plaintiff commenced proceedings to commit the defendant to prison for her refusal to obey a consent order which ordered that the defendant send the child, who was staying with the defendant, to the plaintiff's house every Saturday ('the order'). The plaintiff alleged that the defendant had disobeyed the order on three occasions. On the other hand, the defendant contended that: (i) she was not bound by the consent order as she had never authorized her former counsel to agree to the order; and (ii) the order did not contain the penal notice as required by O 45 r 7(4) and Form 87 of the Rules of the High Court 1980('the RHC 1980').

Held, dismissing the plaintiff's application:

(1) The question of the disobedience of the order on the first two occasions alleged by the plaintiff did not arise because it was common ground that on those dates the order was not yet personally served on the defendant. It is a basic principle that under O 45 r 7(2) of the RHC 1980, personal service of the order is necessary before committal proceedings can be commenced (see p 385B–C).

(2) It was irrelevant whether or not the defendant's counsel, in agreeing to the consent order, had acted in accordance with the defendant's instruction or otherwise. It was a problem to be trashed out only between the defendant and her counsel. Such lack of authorization could not affect the interest of a third party, the plaintiff. It is a principle of law that a party is entitled to rely on the apparent authority of counsel of the opposing party to compromise (see p 385F–H); *Waugh v HB Clifford & Sons Ltd* [1982] 1 All ER 1095 followed.

(3) The court was mindful of the fact that it was dealing with a case where the liberty of an individual was at stakes. Justice would be best served if in the instant case the court were to adopt a conservative and cautious approach. Therefore, the failure to insert the penal indorsement in the order was fatal to the

application (see p 387A–C); *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 1 KB 87 and *Messrs Hisham Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239 followed; *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 distinguished.

(4) Since the defendant had failed to give any valid reason for not complying with the order and since she had disregarded her counsel's advice to so comply, she therefore did not deserve to be awarded costs (see p 388G–H).

[Bahasa Malaysia summary

Plaintif dan defendan merupakan bekas suami isteri dan mereka mempunyai seorang anak berumur dua tahun. Plaintif telah memulakan prosiding komital terhadap defendan untuk memenjarakan defendan kerana dia telah tidak menurut perintah persetujuan yang telah memerintahkan defendan supaya menghantar anak tersebut, yang pada masa itu sedang tinggal dengan defendan, ke rumah plaintif setiap hari Sabtu ('perintah itu'). Plaintif telah mendakwa bahawa defendan telah tidak menurut perintah itu sebanyak tiga kali. Pihak defendan pula telah menghujahkan bahawa: (i) dia tidak terikat dengan perintah itu kerana dia tidak pernah memberikuasa kepada peguambela sebelumnya untuk memberikan persetujuan kepada perintah itu; dan (ii) bahawa perintah itu tidak mengandungi notis penal seperti yang diperlukan menurut A 45 k 7(4) dan Borang 87 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980').

Diputuskan, menolak permohonan plaintif:

(1) Persoalan ketidakpatuhan perintah itu pada dua kali yang pertama seperti yang didakwa oleh plaintif tidak timbul kerana ianya adalah dasar umum bahawa pada tarikh-tarikh tersebut, perintah itu belum lagi disampaikan ke diri defendan. Ianya merupakan prinsip am bahawa di bawah A 45 k 7(2) KMT 1980, perintah itu mesti disampaikan ke diri sebelum prosiding komital boleh dimulakan (lihat ms 385B–C).

(2) Adalah tidak relevan sama ada peguambela defendan, dalam memberikan persetujuan kepada perintah itu, telah bertindak menurut arahan defendan ataupun sebaliknya. Ini merupakan masalah yang harus diselesaikan di antara defendan dan peguambelanya. Ketiadaan pemberiankuasa tidak boleh menjejaskan kepentingan pihak ketiga, iaitu plaintif. Ianya merupakan prinsip undang-undang bahawa sesuatu pihak itu berhak bergantung ke atas kuasa ketara peguambela pihak yang bertentangan untuk berkompromi (lihat ms 385F–H); *Waugh v HB Clifford & Sons Ltd* [1982] 1 All ER 1095 diikut.

(3) Mahkamah sedar akan fakta bahawa ianya sedang mengendalikan sebuah kes di mana kebebasan seseorang itu terlibat. Ianya akan menjadi sungguh adil jikalau dalam kes ini mahkamah

menggunakan pendekatan yang konservatif dan berhati-hati. Oleh itu, kegagalan memasukkan pengindorsan penal dalam perintah itu menjejaskan permohonan tersebut (lihat ms 387A–C); *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 1 KB 87 dan *Messrs Hisham Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239 diikut; *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 dibeza.

(4) Oleh kerana defendan telah gagal memberikan sebab-sebab yang wajar mengapa dia telah tidak menurut perintah itu dan memandangkan yang dia telah tidak mengendahkan nasihat peguambelanya supaya menurut perintah itu, maka dia tidak patut diberikan kos (lihat ms 388G–H).]

Notes

For cases on consent order see 2 *Mallal's Digest* (4th Ed 1994 Reissue) paras 771–787.

For cases on committal proceedings, see 2 *Mallal's Digest* (4th Ed 1994 Reissue) paras 814–818.

Cases referred to

Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors [1986] 2 MLJ 193

B (JA) (An Infant), Re [1965] 1 Ch 1112

Iberian Trust Ltd v Founders Trust and Investment Co Ltd [1932] 1 KB 87

Messrs Hisham Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor [1988] 2 MLJ 239

Ronson Products Ltd v Ronson Furniture Ltd [1966] Ch 603

Waugh v HB Clifford & Sons Ltd [1982] 1 All ER 1095

Legislation referred to

Rules of the High Court 1980 O 42 rr 9, 10, O 45 r 7(2), (4), O 52 r 5(3), Form 87(a)

CE Chuah (*GB Neoh & Anuar*) for the plaintiff.

Tan Beng Hong (*Tan Beng Hong & Co*) for the defendant.

Cur Adv Vult

Mohd Hishamudin J: The plaintiff and defendant are husband and wife, and they have a child, Brenda Leow, who, at the commencement of these committal proceedings, was about two years old. These proceedings by the plaintiff are to commit the defendant to prison for refusal to obey an order of this court dated 22 March 1995 which, inter alia, orders the defendant to send Brenda Leow, who is staying with the defendant, to the plaintiff's house every Saturday so that the plaintiff can be with his child every weekend. Both the plaintiff and the defendant are living separately in Sungai Petani and the distance between the plaintiff's house and the defendant's is about 20 minutes' drive by car.

The order in question is a consent order and it reads: A

> ATAS PERMOHONAN plaintif dalam tindakan ini DAN SETELAH MEMBACA saman pemula yang bertarikh 25 Februari 1995 (lampiran 1) dan afidavit Leow Seng Huat yang diikrarkan pada 20 Februari 1995 (lampiran 2) dan SETELAH MENDENGAR Cik Jaswant Kaur Darshan, peguamcara bagi pihak plaintiff dengan kehadiran peguambela bagi pihak defendan, Encik See Ewe Lin, B
>
> DENGAN PERSETUJUAN
>
> ADALAH DIPERINTAHKAN SELANJUTNYA supaya kanak-kanak tersebut dihantar oleh defendan ke rumah plaintif di alamat No 35A, Lorong Emas Tiga, Taman Emas Suria, 08000 Sungai Petani, Kedah Darulaman pada pukul 10 pagi tiap-tiap hari Sabtu. C
>
> DAN DIPERINTAHKAN SELANJUTNYA supaya kanak-kanak tersebut dipulangkan oleh plaintif kepada defendan di alamat No 22A, Taman Setia, 08000 Sungai Petani, Kedah Darulaman pada pukul 7 petang tiap-tiap hari Ahad.
>
> DAN DIPERINTAHKAN SELANJUTNYA bahawa perintah tersebut di atas berkuatkuasa mulai 25 Mac 1995. D
>
> DAN AKHIRNYA DIPERINTAHKAN bahawa kos bagi permohonan ini dan perbelanjaan akan ditanggung oleh plaintif dan defendan masing-masing.

These proceedings only concern that part of the order which states:

> ADALAH DIPERINTAHKAN SELANJUTNYA supaya kanak-kanak tersebut dihantar oleh defendan ke rumah plaintif di alamat No 35A, Lorong Emas Tiga, Taman Emas Suria, 08000 Sungai Petani, Kedah Darulaman pada pukul 10 pagi tiap-hap hari Sabtu. E

In these committal proceedings, the plaintiff had originally alleged that the defendant had disobeyed the above order on three occasions: F

(1) on Saturday, 25 March 1995;

(2) on Saturday, 1 April 1995; and

(3) on Saturday, 8 April 1995.

Subsequently, the plaintiff, by summons in chambers and pursuant to O 52 r 5(3) of the Rules of the High Court 1980 ('the RHC 1980'), applied for leave to add more grounds, that is to say, to further allege that there was also disobedience of the order on four other occasions: G

(1) on Saturday, 15 April 1995;

(2) on Saturday, 22 April 1995; H

(3) on Saturday, 29 April 1995; and

(4) on Saturday, 6 May 1995.

The defendant did not object to the application and, accordingly, leave was granted. The plaintiff, however, did not take any action to draw up and to enter the order granted as required by O 42 rr 9 and 10 of the RHC 1980. So, for the purpose of these proceedings, I shall ignore these additional grounds and shall only proceed to consider the original allegations (perhaps this is the reason why learned counsel for the defendant, in his written I

A submission, did not touch on the alleged disobedience on these four dates).

I think it is convenient that at the outset I should make a ruling and dispose of the question of whether or not there was disobedience of the order on 25 March and 1 April 1995. It is my view that the question of B disobedience of the order on 25 March and 1 April 1995 does not arise because it is common ground that on these dates the consent order was not yet personally served on the defendant. It was personally served on the defendant only on 6 April 1995. It is a basic principle that personal service of the order is necessary before committal proceedings can be commenced (see O 45 r 7(2) of the RHC 1980). The rationale is stated by Stamp J in C *Ronson Products Ltd v Ronson Furniture Ltd* [1966] Ch 603 at p 614:

> If a man be ordered to do an act, so that his failure to do it may lead him to prison, justice requires that he know precisely what he has to do and by what time he has to do it ...

D Therefore, it follows that the only issue for me to consider now is whether there was disobedience of the order by the defendant on 8 April 1995.

The defendant in evidence admits that she did not send the child to the plaintiff on 8 April 1995 but denies that she had wilfully disobeyed the court's order and she gives her reasons for the non-compliance.

E However, I shall first decide on two points of law that have been raised by learned counsel for the defendant, En Tan Beng Hong. The first issue is whether the defendant is bound by the consent order as she had never, in the first place, authorized her former counsel, En See, to agree to the consent order. With respect, on this issue, I agree with the submission of learned counsel for the plaintiff, En CE Chuah, that it is irrelevant F whether or not En See, in agreeing to the consent order, had acted in accordance with the defendant's instruction or otherwise. Assuming that it is true that the defendant had never authorized her former counsel, En See, to agree to the consent order, that however, is a problem to be trashed out only between the defendant and her counsel: such lack of authorization cannot affect the interest of a third party, the plaintiff. It is a principle of G law that a party is entitled to rely on the apparent authority of the counsel of the opposing party to compromise: *Waugh v HB Clifford & Sons Ltd* [1982] 1 All ER 1095. Therefore, En See, being the defendant's duly appointed counsel at the material time, had the apparent authority to compromise and the plaintiff's counsel was entitled to rely on such ostensible H or apparent authority when agreeing to the consent order.

The other point of law is whether the fact that the said order does not contain the penal notice as required by O 45 r 7(4) and Form 87(a) of the RHC 1980 is fatal to the application. Order 45 r 7(4) of the RHC 1980 stipulates:

I 7(4) There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served—

(a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it.

Form 87(a) of the RHC 1980 reads:

No 87

NOTICE ON CERTAIN JUDGMENTS

> The indorsement should be in the following words or words to the following effect:
>
> (a) In the case of a judgment or order requiring a person or body corporate to do an act within a specified time —
>
> > If you, the within-named ... (or ...) neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same.

The object of requiring such indorsement is simply, in the words of Luxmoore J in *Iberian Trust Ltd v Founders Trust and Investment Co Ltd* [1932] 2 KB 87 at p 97:

> to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences.

En Tan submits that the omission is fatal and he refers to *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239 where Edgar Joseph Jr J (as he then was) held at p 244:

> Since it was common ground that neither the company nor the alleged contemnors were served with the consent order bearing the appropriate penal endorsement, duly or at all, as required under O 45 r 7(4), the application for committal was fatally flawed on this ground as well (see for example, *Arumugam v Suppiah Chettiar* [1935] MLJ 4; *The Vanda* [1960] MLJ 283).

En Chuah, on the other hand, submits that the defect is a mere technical irregularity and that the defendant is not prejudiced by the omission, and he cites the Supreme Court's decision in *Arthur Lee Meng Kwang v Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 where, Mohamed Azmi SCJ, in delivering the judgment of the court, after referring to the judgment of Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112, ruled at p 195:

> There is therefore a distinction in principle between cases where there have been non-observance of some safeguards laid down in O 52 of the RHC 1980 in the interest of the alleged contemnor, and a mere technical irregularity. Whilst the former is fatal, the latter is not. In our opinion, this is the correct principle to be applied in all contempt proceedings under O 52 of the RHC 1980 which, it must be noted, is distinct from summary contempt procedure which is normally resorted to only in urgent and imperative cases, where the contempt is committed in the face of the court.

With respect, I am reluctant to hold that the above dicta is binding in the present case for the simple reason that in the above case the Supreme Court was not dealing with a case where there had been an omission of the penal indorsement on the order.

Although considering the facts of the present case I am greatly tempted to brush aside such a technical objection as has been raised by the defence, I am, however, also mindful of the fact that here I am dealing with a case where the liberty of an individual is at stake. After having given

much thought to the matter, it is my judgment that justice is best served if in the instant case I were to adopt a conservative and cautious approach. In other words, in my opinion, it is prudent that I follow the approach as adopted by the courts in *Messrs Hisham, Sobri & Kadir v Kedah Utara Development Sdn Bhd & Anor* [1988] 2 MLJ 239 and *Iberian Trust Ltd v Founders Trust & Investment Co Ltd* [1932] 2 KB 87. Accordingly, I hold that the failure to insert the penal indorsement in the order is fatal to the application.

It follows, therefore, that this application is dismissed.

Next, there is the question of costs. En Chuah submits that in the event I dismiss the present application by reason of the failure of the plaintiff to insert the penal indorsement in the order, the court should not award costs to the defendant since there was wilful disobedience on her part.

Was there wilful disobedience on the part of the defendant? The defendant in her evidence gave the following reasons for the non-compliance:

(a) she is a school teacher and is required to work on Saturdays until 11.40am;

(b) she did not have any transport at the material time;

(c) the child, Brenda, was sick at the material time; and

(d) the defendant did not trust the plaintiff and his aged parents with the child.

In my judgment, there is no merit at all in the above excuses. As to (a), the fact that the defendant is a teacher who has to work on Saturdays is not an acceptable excuse. She has to give priority to the court's order. Upon being served with the order, all that she had to do was to show to the principal of the school the court's order and no right-minded employer would stop an employee from taking time off to comply with an order of the court. Indeed, it would be contempt of court for the principal, or indeed, any person, to prevent her from obeying the court's order. However, there is no evidence that she had discussed the order with her principal.

As to (b), this is another lame excuse. The defendant merely said in evidence that she did not have a car, but there is no evidence that she had taken reasonable efforts to look for transport. Did she try calling for a taxi? Did she try to get the help of family members or friends? There is the saying, 'If there is a will, there is a way' and there is also the equivalent Malay saying, 'Kalau hendak seribu daya, kalau tak hendak seribu dalih'. My assessment of the defendant's evidence is that there was simply no will on her part to comply with the order.

As regards (c), there is no evidence given by the defendant during examination-in-chief and cross-examination that the child was sick on 8 April 1995. Throughout examination-in-chief and cross-examination on 7 May 1995, the defendant merely said that the child was not well (dalam keadaan kurang baik) from 22 March until 28 March 1995. However,

during the re-examination some four months later on 27 September 1995, surprisingly, she changed her story as follows:

> Betul Brenda sakit pada 28 Mac 1995. Sakit selama lebih kurang satu bulan. Semasa saya masuk lokap pada 30 April 1995, dia masih sakit lagi.

In my opinion, this latter evidence about the child being sick for one month is nothing but a blatant lie and an exaggerated afterthought. Indeed, the family doctor, Dr Khoo Oon Siang, testified that the child was brought to him for treatment only on three occasions, that is, on 10 March 1995 (for worm treatment), on 30 March 1995 (measles) and on 15 April 1995 (cough and cold).

Lastly, as to (d), I do not think that there is any merit in the reason given here. What I find here is nothing but mere unsubstantiated assertions by the defendant against her estranged husband and her in-laws.

There is also another point which I think I also ought to take into account in considering whether or not to award costs to the defendant. En See Ewe Lin, the counsel who represented the defendant in court at the time when the consent order was obtained and who testified as a witness for the defence, gave evidence that he had advised the defendant to obey the order even if she did have problems in complying with the order. This is what he said in evidence:

> I did advise my client to comply with the order. The defendant replied that she did not have the transport and, secondly, Brenda at that time was having high fever. Notwithstanding that, I told the defendant that she would still have to comply with the order. She told me that nobody could look after Brenda and that Brenda was crying frequently. But I told her that all these were secondary. She would still have to comply with the court's order.

What the defendant had done in the present case was clearly against the advice of her counsel at the material time.

Since the defendant had failed to give any valid reason for not complying with the court's order and she had disregarded her counsel's advice, in my judgment, she does not deserve to be awarded costs.

Application dismissed.

Reported by Ng Sheau Jiuan